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No. 75-237

In the Supreme Court of the United States

OCTOBER TERM, 1975

JAMES L. COBB, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner seeks review of the decision below enforcing an Internal Revenue summons requiring production of the books and records of a law partnership of which he is a partner.

The pertinent facts are as follows: In connection with an investigation of petitioner's individual income tax liability, the Internal Revenue Service issued a summons to "Messrs. P. F. Beasley, James L. Cobb, Jr., and W. C. Oldfield, operating under the firm name of Cobb, Beasley and Oldfield." The summons was served on petitioner and required him, *inter alia,*

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to produce and turn over various records used in the preparation of the 1971 and 1972 law partnership returns to which he was a party. Petitioner refused to comply with the summons on the ground that compelled production would violate his privilege against self-incrimination.

The district court enforced the summons, finding that the requested documents were partnership records, within the meaning of applicable Kentucky law. The court held that the case was controlled by this Court's decision in *Bellis* v. *United States,* 417 U.S. 85 (Pet. App. C 7a–10a).[1] The court of appeals affirmed by order (Pet. App. B 2a–4a).

The courts below correctly recognized that this case is squarely controlled by *Bellis.* There, this Court held that the personal privilege against self-incrimination of one of the partners does not bar the compelled production of the records of a partnership.[2] The fact that *Bellis* involved a grand jury subpoena rather

[1] The district court's order excluded petitioner's client files, and any testimony by petitioner other than that necessary to identify the financial records produced (Pet. App. C 10a).

[2] Although petitioner argues (Pet. 8) that there was a formal partnership agreement in *Bellis*, the existence of such an agreement was not a consideration in the decision. Indeed, the record was unclear on this point (see 417 U.S. at 96, n. 4). Moreover, petitioner's further argument (Pet. 8) that he was the sole surviving member of the partnership and had "sole possession, custody and control of all records" does not support his claim of privilege, for *Bellis* held that the dissolution of a partnership does not permit the custodian of the partnership records to claim his personal privilege with respect to such records (417 U.S. at 96, n. 3).

than an Internal Revenue summons does not distinguish the cases. Both a grand jury subpoena and an Internal Revenue summons are well established legal processes to secure testimony and the production of documentary evidence.

Petitioner also argues (Pet. 7) that production would constitute an unreasonable search and seizure within the meaning of the Fourth Amendment because, in his view, "[n]othing in the Internal Revenue Code sanctions the issuance of a Summons in aid of a criminal investigation." But in *Donaldson* v. *United States,* 400 U.S. 517, 535, this Court observed that "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct." In the absence of a recommendation by the Internal Revenue Service for criminal prosecution prior to the issuance of the summons, its enforcement is expressly sanctioned by *Donaldson.*[3]

Finally, petitioner challenges the finding of the district court—affirmed by the court of appeals as not

[3] Petitioner appears to rely principally (Pet. 6) on *United States* v. *Kleckner*, 273 F. Supp. 251 (S.D. Ohio), appeal dismissed, 382 F.2d 1022 (C.A. 6). But *Kleckner* involved purely private papers, and not records of a collective entity held in a representative capacity. Two other cases cited by petitioner (Pet. 6), *United States* v. *Slutsky*, 352 F. Supp. 1105 (S.D. N.Y.), and *In re Subpoena Duces Tecum*, 81 F. Supp. 418, 421 (N.D. Cal.), were cited in *Bellis* (417 U.S. at 101) for the proposition that the privilege might be available where, unlike here, the records sought are those of a "small family partnership." In *Boyd* v. *United States*, 116 U.S. 616, also cited by petitioner (Pet. 5), the records sought were partnership records but were nevertheless treated as purely private papers. See *Bellis* v. *United States*, *supra*, 417 U.S. at 91–92.

clearly erroneous (Pet. App. B 3a–4a)—that the existence of a partnership had been proved. Here, it is undisputed that petitioner practiced law in association with other lawyers, that the relationship was purely professional in nature, that they held themselves out as partners, that they shared a common bank account, and that they knowingly filed federal partnership returns for the years at issue (Pet. App. C 9a). As the court of appeals concluded (Pet. App. B 3a–4a), there was ample evidence to support the district court's finding of a partnership. Such a factual question does not warrant further review by this Court. *Comstock* v. *Group of Investors,* 335 U.S. 211, 214.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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